No. 683

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

HOME LAND AND CATTLE COMPANY, a Corporation, and THE NATIONAL BANK OF COMMERCE in St. Louis, a National Banking Corporation,

Appellants,

vs.

CORNELIUS J. McNAMARA and THOMAS A. MARLOW, Copartners under the style and firm name of McNamara & Marlow,

Appellees.

Additional Brief of Appellants.

Appeal from the Circuit Court of the United States for the District of Montana.

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Appellants,

vs.

CORNELIUS J. McNAMARA and THOMAS A. MARLOW, Copartners under the style and firm name of McNamara & Marlow,

Appellees.

ADDITIONAL BRIEF OF APPELLANTS.

In pursuance to the leave granted by this Court, appellants file this additional brief and respectfully submit that the contract, out of which this suit arose, was executed in Chicago, but was to be performed in Montana. Therefore the laws of Montana should govern.

The master found that appellant, Cattle Company, was a Missouri Corporation and that appellant, Bank of Commerce, was a national banking institution incorporated under the Acts of Congress of the United States, and was a citizen and resident of Missouri (Findings 2 and 3). That the contract in question was executed by the parties thereto (Finding 4) on May 27th, 1897, and said Cattle Company assigned its interest in said contract to said Bank of Commerce, May 28th, 1897.

The master further found that both appellants were solvent and amply able to respond to appellees for any damage they might suffer by reason of appellants' failure to complete the contract in question.

The master did not find that the particular cattle covered by the contract in question were peculiarly needed by the appellees, nor that they had any special value different from any other range cattle, nor that appellees could not have purchased other cattle elsewhere to supply the shortage claimed by them, and charged the difference between their cost price and the contract price to appellants.

The master found that the difference between the contract price and the market value of the cattle was five dollars a head (Finding 16.)

Under these findings of solvency on the part of appellants, the actual monetary damage to appellees' coupled with the fact that there was no peculiar value to appellees of the property, there is no showing whereby a Court of Equity could or should exercise its discretion and decree specific performance. Nor have appellees made any tender of payment for the property of appellants, excepting a tender of settlement wherein they charged appellants and deducted twenty dollars a head as liquidated damages for the shortage.

We earnestly contend that under these facts specific performance should not have been decreed. Appellees' cause of action was not by suit for specific performance but by an action at law for damages: Or, if they desired the Montana Courts to retain jurisdiction, by attachment.

If a debtor is solvent it is only right and proper that his creditor be compelled to reduce his claim to a judgment before he demands possession of his debtor's property. It is not right or proper that a creditor be allowed to place a receiver in possession of his solvent debtor's property simply because he has a claim against such debtor. Receivership, specific performance or any other form of equitable relief should not be had simply for the asking, but only where good cause is shown. In the case at bar there is absolutely no reason why appellee should not pursued his legal remedy as there was an adequate remedy at law.

And it should have been so ordered by the Court below.

It is quite evident from the opinion filed by the Court below that specific performance was decreed, not because it was appellees' proper remedy, but because they would be forced to go to Missouri and prosecute their demands in that State, and that they could not have done so with any assurance of obtaining complete redress.

Although finding appellants perfectly solvent, the Court declared: "As far as the defendant, the Home Land and Cattle Company is concerned, I think it may be treated as if insolvent in Montana." The Court below further said, "and although said Cattle Company had other cattle on the range and scattered, it would seem unjust to require a creditor to hunt them up in order to render them subject to his demand."

In other words, if a company, corporation or indivual undertakes to transact business in any State other

than the one in which it resides, and enters into any contractual relation with a citizen or company in that other State, before doing so, must keep in that other State sufficient assets to cover all liabilities, fixed or contingent, or be declared insolvent and have its business taken charge of and wound up by a receiver. And this, too, no matter how solvent the individual, firm or corporation may be in the State where its head or chief place of business is.

If the Court below is correct in this opinion, then it is doubtful if there is a corporation, firm or individual in the United States engaging in a manufacturing or wholesale business is solvent in any State in the Union outside of the State in which their principal office is situated. Such a ruling as this is manifest error, is extremely dangerous to the business world and we submit should be corrected by this Court.

SPECIFIC PERFORMANCE.

The only conditions under which specific performance should be decreed are found in section 4410 of the Montana Code, and are, 1st, in the enforcement of specific performance of an express trust; 2d, when pecuniary compensation would not afford adequate relief; 3d, when it would be extremely difficult to ascertain the actual damage caused by the nonperformance; or 4th, when specific performance has been actually agreed on in writing by the parties.

It will be readily seen that specific performance could not be demanded and should not have been decreed under any of the foregoing provisions. There was no express trust, nor was there any agreement between

the parties in writing for specific performance, nor was it a case where pecuniary compensation would not have afforded adequate relief, nor was it difficult to ascertain the actual damage to appeelles caused by the nonperformance on the part of appellants.

On the contrary, the master found the difference to be $5.00 a head on a shortage of 1860 head, or $9,300.

This fact ascertained by the master could easily have been ascertained by appeelles, and, as appellants were absolutely solvent, specific performance should not have been decreed, and the bill should have been dismissed.

But what did the Court decree? Did the Court decree specific performance, with a further order that appellees pay the purchase price to the receiver, with which to pay the expense of this litigation and the balance to appellants? No; but on the contrary, it ordered appellant's cattle, or the proceeds thereof, turned over to the appellees, and thereupon the receiver shall stand discharged without further liability. In other words, the cattle are turned over to the appellees without consideration; which is nothing more or less than a total confiscation of appellant's property without any compensation therefor. The Court neither ordered nor provided for a credit to be allowed to defendants for these cattle, no payment to be made to, or settlement with, the receiver—merely orders the property, or the proceeds thereof, turned over to appellees and the receiver to be discharged from further responsibility. And in addition to the confiscation of appellant's property, appellants must pay all costs. A mere suggestion of the inequity and injustice of this decree and hardship worked on

these appellants should, we submit, be sufficient to cause a rescission of the decree in this case.

PENALTY.

This contract, to be performed in Montana, should be governed by the statutes of that state.

Sections 2243 and 2244 of that state, adopted from the state of California, read as follows:

Section 2243. Every contract, by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation is determined in anticipation thereof, is, to that extent, void, except as expressly provided in the next section.

Section 2244. The parties to a contract may agree upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when from the nature of the case it would be impracticable or extremely difficult to fix the actual damage.

Now construing the penalty of twenty dollars per head as contained in the ninth clause of the contract, we submit that it must be construed as a penalty and not liquidated damages, for the reason that "from the nature of the case it would be impracticable or extremely difficult to fix the actual damage." The actual damage was ascertained, found, and fixed the master by testimony just as any other fact should be proven. It therefore follows that, under the sections before quoted, this clause of the contract is void.

And although the section above quoted voids this ninth clause of the contract, and although appellees could have ascertained their exact damages and sued therefor in law, yet they come into a court of equity seeking equity, and at the same time are confessedly retaining $38,450

of defendants' money, when they are entitled to only $9,300, leaving in their hands due to appellants $29,-150.00. Nor is there any order or decree that such sum be turned over to appellants. As the case now stands, appellees are to retain appellants' property, make no accounting, and retain $38,450 in payment of a $9,300 claim.

The record shows that the day before the receiver was appointed the appellants delivered to appellees 933 head of cattle at $25.00 per head, $23,325. The next day the receiver took 457 head, which at $25.00 a head, $11,425. Appellees had collected for 148 head of strays, which at $25.00, $3,700. Making a total due appellants, $38,450. Appellants owe appellees on shortage $5 a head on 1,860 head, $9,300. Balance due to appellants from appellees and receiver for cattle delivered and not paid for, $29,150.

The master's report, adopted by the Court below, finds in section 11 that appellees made a tender to appellants which included 113 strays at $25.00 per head, and in finding No. 8 finds that appellees had received the proceeds of 148 head. In other words, the findings show that appellants are entitled to the proceeds of 148 head of strays, and not 113, as set out in appellees' tender. And this discrepancy discloses another fact. The tender, as made by appellees, was not a valid tender, as it was $875 less than it should have been, being the difference between 113 strays and 148 strays, or 35 strays at $25 per head.

We therefore respectfully submit that:

1st. The Court below had no jurisdiction to decree specific performance in this case;

2d. Appellees' remedy was by attachment or suit for debt;

3d. The decree in this case is unjust and does not equitably settle the affairs between the parties litigant;

4th. The decree is improper in that it turns appellants' property over to appellees, with no provision for payment by appellees, nor for an accounting of any manner or kind, and discharges the receiver

5th. The tender made by appellees was not a proper tender, in that it was $875 less than it should have been according to appellees' construction of the ninth clause.

6th. The court erred in adopting the first and second conclusions of law submitted by the master in this, that the facts show that appellants were performing the conditions on them imposed up to the time the receiver was appointed, and that appellees had refused to carry out the conditions on them imposed by refusing to pay for cattle as delivered to them in carload lots.

King v. Faist, 161 Mass. 449.
Stephenson v. Cody, 117 Mass. 6.

7th. Appellees committed the first breach of the contract by refusing to pay for cattle when delivered in carload lots.

Hayes v. Nashville, 80 Fed. 611.

8th. The court erred in decreeing specific performance for the further reason that the contract provided a penalty. Where a penalty is provided, the failure to carry out the conditions of the contract matures the penalty, and is not a breach.

Beach Modern Law of Contracts, sec. 416.
Ehrlick v. Ins. Co., 15 S. W. 530.

Respectfully Submitted,

F. C. SHARP.
Of Counsel.